Supreme Court, U.S.
FILED

No. 031558 MAY 17 2004

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

In Re EGRI

NANCY BURTON,

Petitioner,

—v.—

CONNECTICUT YANKEE ATOMIC POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner Pro Se

QUESTIONS PRESENTED

1. Does 28 U.S.C. § 1447(c) prohibit a district court from ordering withdrawal of a state court suit *after* the district court remanded the suit to the state court because it lacked federal jurisdiction over the suit?

2. Does 28 U.S.C. § 1447(c) prohibit a district court from holding plaintiffs' counsel in contempt of the court and imposing a $2,500 punitive penalty for noticing the deposition of a witness in a state court suit *after* the district court ordered the suit remanded to the state court because of the absence of federal jurisdiction?

PARTIES TO THE PROCEEDINGS

Petitioner: Nancy Burton, Plaintiffs' counsel

Respondent: Connecticut Yankee Atomic Power Company

Parties Below: Plaintiffs:

Andrew J. Egri, an individual

Edward Munster, an individual

Neighbors Opposed to Residential Atomic Dumps

Defendants:

Town of Haddam Board of Selectmen, a municipal agency

Alan Paskowich, in his official capacity as building official of the Town of Haddam, Connecticut

Nancy Burton, Petitioner *Pro Se*, requests that this Court issue a writ of *certiorari* to the United States Court of Appeals for the Second Circuit.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. 1a) and the decision of the district court (App. 2a) are unreported.

JURISDICTION

The Order of the Court of Appeals for the Second Circuit was filed on December 23, 2003. The Court of Appeals denied petitioner's Petition for Rehearing *En Banc* on February 17, 2004.

This Court has jurisdiction under 28 U.S.C. § 1254.

Subject matter jurisdiction for the Court of Appeals for the Second Circuit was invoked under 28 U.S.C. § 1291.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1447(c) provides as follows:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1651(a) provides as follows:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

The district court[1] held the petitioner, Nancy Burton, an attorney acting *pro bono publico,* in contempt of court[2] and ordered her personally to pay the respondent, Connecticut Yankee Atomic Power Company ("Connecticut Yankee"), $2,500 for noticing the deposition of a witness in a state court suit *after* the district court ordered the suit remanded to the state court because of the absence of federal jurisdiction.

Further, the district court ordered the petitioner to withdraw the suit forthwith under penalty of an escalating monetary sanction of $1,000 per day.

This petition argues that the district court clearly acted outside its federal jurisdiction and contrary to 28 U.S.C. § 1447(c) and that such conduct deprived the petitioner of fundamental due process.

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[1] U.S. District Judge Alan H. Nevas presided over all matters pertinent to this petition and the related petition, *In re Egri*, 03-865. See footnote 5, *infra*. For purposes of this petition, the prior petition will be referred to herein as "*In re Egri* I."

[2] On July 1, 2002, the district court previously held the petitioner in contempt of court in this case for instituting lawsuits in the state court under the state's environmental protection statute, for appearing at public meetings of town agencies and for writing letters to town officials concerning this controversy. The district court ordered the petitioner to pay Connecticut Yankee $171,546 as a punitive sanction for such conduct. See text at page 6. The petitioner at all times has maintained that her conduct was faultless and protected by the First Amendment. On February 23, 2004, the U.S. Supreme Court denied the petitioner's Petition for Writ of Certiorari challenging such contempt orders. *See* footnote 5 *infra*.

FACTUAL BACKGROUND

On April 17, 2002, the attorney petitioner[3] instituted the case of *David Warmsley et al. v. Connecticut Yankee Atomic Power Company ("Warmsley")* in the Superior Court of the State of Connecticut for the Judicial District of Middlesex at Middletown on behalf of her clients, David Warmsley and Douglas R. Jones.

The suit was brought to address concerns that the Broteer-Venture Smith Archaeological Site, the subject of the suit, encompasses the land where Connecticut Yankee Atomic Power Company ("Connecticut Yankee") proposed to site a high-level radioactive waste dump in Haddam, Connecticut, and that such facility will defile the Broteer-Venture Smith Archaeological Site and render it inaccessible.[4]

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[3] On December 16, 2003, the Connecticut Supreme Court issued an order disbarring the petitioner from the practice of law in the State of Connecticut in part because of Judge Nevas' first order of contempt and imposition of the $171,546 punitive sanction. The petitioner has challenged such disbarment order in a petition for writ of *certiorari* currently pending before this Court. *Nancy Burton v. Hon. A. William Mottolese*, 03-1408. The petitioner remains licensed to practice law in the U.S. District Court of the State of Connecticut and elsewhere.

[4] In *In re Egri* I, 03-865, Connecticut Yankee misrepresented these facts. In its Brief in Opposition, footnote 5 at 4-5, Connecticut Yankee stated: "The [*Warmsley*] suit was based on pure speculation that Venture Smith, an historic figure, might have owned the [nuclear waste dump] site and that the site might contain artifacts of archaeological significance to Venture Smith. Comprehensive investigations by archaeologists retained by Connecticut Yankee and by the State of Connecticut have refuted this speculation and eliminated the putative statutory basis for the suit. Despite the State of Connecticut's unequivocal statements that the [nuclear waste dump site] is not and was not under consideration for listing on the National Register of Historic Places, Petitioner [Nancy Burton] continues to make that false representation to this Court." This statement is patently false in

Plaintiff David Warmsley is an eighth generation lineal descendant of Broteer-Venture Smith, an African prince kidnapped at the age of six from his homeland in Guinea, Africa, and sold into New England slavery in *circa* 1735. Smith is considered legendary because he achieved his freedom and that of his wife and children after 30 years of enslavement by accumulating meager pay. He became a successful entrepreneur and landowner, unusual feats for a former captive African during such historical period. Professional archaeologists presented evidence in the proceedings in the district court that the site in question, where Smith lived with his family and cultivated the land, is the most important archaeological site of the colonial era in Connecticut. Smith's autobiography[5] is believed to be the oldest surviving first-person account of a former slave's life in Africa and colonial America. Connecticut Yankee's archaeologists uncovered pottery shards of the Smith era at the proposed nuclear waste site, leading archaeologists to

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several respects. In *Warmsley*, the plaintiffs submitted unrebutted evidence that Broteer-Venture Smith owned the site in question. In sworn testimony, Connecticut Yankee's archaeologists testified that they unearthed the Smith-era pottery shards from the location the plaintiffs identified as within the Broteer-Venture Smith Archaeological Site. The historical boundary of the Broteer-Venture Smith land holdings were established by the municipal historian of the Town of East Haddam, as confirmed by a registered licensed surveyor. The boundary clearly encompasses the nuclear waste dump site. The State of Connecticut abandoned its own efforts to establish the boundary of the site—a key step in the process of nominating any site to the National Register of Historic Places—after Connecticut Yankee exerted power and influence. In the proceedings below, neither the State of Connecticut nor Connecticut Yankee ever refuted the boundaries so established.

[5] *A Narrative of the Life and Adventures of Venture, A Native of Africa, But Resident Above Sixty Years in the United States of America* (First published in 1798, republished by Wesleyan University Press in 1971.)

believe that the site may have been used as a family burial ground following the African custom of burying the dead near bodies of water to ease passage to "the other side."

Prior to the instant controversy, John W. Shannahan, Director of the Connecticut Historical Commission, initiated the nomination of the Broteer-Venture Smith Archaeological Site to the National Register of Historic Places because of the state's recognition of the cultural and historical importance of Broteer-Venture Smith as an early symbol of the American quest for human rights and liberty. Smith's burial place in East Haddam has been designated a stop on the state's Freedom Trail by the state legislature.

Warmsley was brought pursuant to the Connecticut Environmental Protection Act, which provides in pertinent part as follows:

> Connecticut General Statutes § 22a-19a. The provisions of sections 22a-15 to 22a-19, inclusive, shall be applicable to the unreasonable destruction of historic structures and landmarks of the state, which shall be those properties (1) listed or under consideration for listing as individual units on the National Register of Historic Places . . .

Pursuant to § 22a-19, the state court has jurisdiction to protect the Broteer-Venture Smith Archaeological Site from "unreasonable destruction."[6]

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[6] In proceedings below, the Warmsley plaintiffs represented that the Connecticut Yankee project violates the National Historic Preservation Act, which requires a comprehensive survey of archaeologically significant sites prior to their disturbance. When the *Warmsley* plaintiffs sought to address such isues in a prospective lawsuit, the district court forbid them from proceeding under threat of contempt.

On May 3, 2002, on the eve of a hearing in the state court on plaintiffs' application for a temporary injunction to enjoin use of the historic site for a nuclear waste storage facility pending a comprehensive archaeological survey, Connecticut Yankee removed *Warmsley* to the U.S. District Court. Connecticut Yankee alleged the district court had jurisdiction over *Warmsley* pursuant to the All Writs Act, 28 U.S.C. § 1651.

On July 1, 2002, following various proceedings in the case, the district court granted Connecticut Yankee's motion to hold the petitioner in contempt of court and ordered her to pay Connecticut Yankee $171,546 as a punitive sanction for instituting *Warmsley* as well as a separate state suit challenging a wetlands permit issued to Connecticut Yankee, and for appearing at public hearings of Town of Haddam agencies and writing letters to public officials. Petitioner's appeal to the Court of Appeals ensued.[7]

While the appeal was pending, on November 5, 2002, the U.S. Supreme Court ruled in *Syngenta Crop Protection v. Henson*, 537 U.S. 28 (2002), that the All Writs Act does not provide an independent basis for removal of a state action to federal courts in the absence of another basis for federal jurisdiction. Citing *Syngenta*, the *Warmsley* plaintiffs moved to remand their suit to the state court. On December 12, 2002, citing its lack of federal jurisdiction over *Warmsley* in light of *Syngenta*, the district court granted plaintiffs' motion for remand, acknowledging the absence of federal jurisdiction over the case. On December 19, 2003, pursuant to such order

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[7] On appeal, the Court of Appeals for the Second Circuit affirmed the contempt order without a hearing. The petitioner petitioned this Court for a writ of *certiorari* seeking further appeal of such contempt orders. The petition was denied on February 23, 2004. *In re Egri I*, 03-865.

of remand, the clerk of the U.S. District Court mailed a certified copy of the order of remand and the *Warmsley* file to the clerk of the Superior Court of the State of Connecticut. On December 20, 2002, pursuant to 28 U.S.C. § 1447(c), which allows for "payment of just costs and any actual expenses including attorney's fees incurred as a result of the removal," the *Warmsley* plaintiffs moved for an award of costs and attorney's fees totalling $171,546. App. 15a. The district court denied the motion.

On May 9, 2003, on behalf of the *Warmsley* plaintiffs, the petitioner served notice of deposition on May 29, 2003 of John W. Shannahan, the Connecticut Historical Commission Director who had initiated the nomination of the Broteer-Venture Smith Archaeological Site to the National Register of Historic Places. The deposition was noticed consistent with the Connecticut rules of court. The plaintiffs planned to ask Mr. Shannahan to reconcile his nomination of the Broteer-Venture Smith Archaeological Site to the National Register of Historic Places with later correspondence from his office, for use by Connecticut Yankee in the present litigation, asserting just the opposite: that the site in question has no historical, cultural or archaeological significance. The deposition did not proceed.[8]

On May 13, 2003, Connecticut Yankee filed a second motion for contempt in the case of *Andrew Egri et al. v. Connecticut Yankee Atomic Power Company*, 3:01 CV 400 (AHN) by which it sought an order by Judge Nevas finding that the petitioner had acted in contempt of the

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[8] Although Mr. Shannahan appeared for the deposition, Connecticut Yankee's attorneys, in the petitioner's absence, persuaded a state court judge to quash the deposition. Several days later, Mr. Shannahan resigned from his long-held position with the State of Connecticut.

district court by noticing Mr. Shannahan's deposition in the *Warmsley* case, then pending in the state court.

Connecticut Yankee's objective in filing the motion for contempt was to "enlist Ms. Burton's assistance, through this process, to end the [*Warmsley*] litigation . . ." (Statement of Connecticut Yankee Attorney Allan B. Taylor) (Transcript, June 11, 2003, page 64)

At hearing on the motion for contempt on June 11, 2003, the district court acknowledged that it lacked federal jurisdiction over the case.[9]

Nevertheless, on July 1, 2003, in written orders, the district court ordered the undersigned attorney to **withdraw** *Warmsley* from the docket of the Connecticut Superior Court **despite its acknowledgment that it lacked jurisdiction over the case**.

The written orders, App. 2a, direct as follows:

1. Ms. Burton shall withdraw within three days of this Order's issuance all notices of deposition and any other documents served by her for the purpose of prosecuting *Warmsley, et al. v. Connecticut Yankee Atomic Power Company*, Conn. Super. Ct. No. 02 98136.

2. Three days after this Order has been issued, Ms. Burton shall be subject to an escalating sanction of $1,000.00 for each 24-hour period in which she has not withdrawn any document served by her for the purpose of prosecuting *Warmsley, et al. v. Connecticut Yankee Atomic Power Company,* Conn. Super. Ct. No. CV 02

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[9] The district court stated as follows during the June 11, 2003 proceedings on the motion for contempt: "The *Warmsley* matter has been remanded to state court pursuant to the decision of the United States Supreme Court [*Syngenta*] and I have nothing to do with *Warmsley*."

98136. The same escalating sanction also shall apply if Mr. Burton serves or files any new document that continues her prosecution of the *Warmsley* litigation.

3. Ms. Burton shall pay $2,500.00 to compensate Connecticut Yankee for reasonable attorney's fees incurred in bringing this Motion for Contempt.

In response to such orders, the petitioner promptly (a) withdrew the notice of deposition of John W. Shannahan and (b) filed a withdrawal of the *Warmsley* suit in the Superior Court of the State of Connecticut under protest.

On June 23, 2003, the petitioner on behalf of her clients filed a writ of mandamus in the Court of Appeals in which she sought an order vacating the contempt orders. The Court of Appeals denied the writ on grounds the petitioner-plaintiffs had not established that they were clearly entitled as a matter of law to the relief sought.

On August 7, 2003, the petitioner filed a notice of appeal challenging the district court's contempt orders.

On October 1, 2003, Connecticut Yankee moved for summary affirmance of the contempt orders on grounds that the present appeal involves nearly identical issues as were raised in *In re Egri* I and which had been rejected by the Court of Appeals (although the petition for writ of *certiorari* to the U.S. Supreme Court had not yet been filed). On December 23, 2003, the Court of Appeals granted the motion for summary affirmance. App. 1a. On January 6, 2004, the petitioner petitioned the Court of Appeals for rehearing *en banc*. The Court of Appeals denied the petition for rehearing *en banc* on February 17, 2004. App. 14a

REASONS FOR GRANTING THE WRIT

In affirming the order of contempt, the Court of Appeals acted contrary to 28 U.S.C. § 1447(c) and contrary to established precedent of this Court and all circuit courts which have considered this issue and thereby deprived the petitioner of due process of law. The district court usurped the power of the state court to adjudicate a case properly brought before it and over which the district court lacked federal jurisdiction. The district court deprived the petitioner of due process of law by sanctioning her for engaging in conduct authorized by state court rules in a state court action over which the federal court lacked jurisdiction. The egregious conduct of the district court thereby offended fundamental notions of due process as well as federalism; the Court of Appeals erred in affirming the orders. The petitioner requests that this writ be granted and that the Supreme Court grant review of this matter.

DISCUSSION

I. The district court acted contrary to 28 U.S.C. § 1447(c).

Pursuant to federal law, 28 U.S.C. § 1447(c), as construed by the U.S. Supreme Court, the circuit courts, and all recognized treatises on federal law, a district court lacks jurisdiction to interfere directly or indirectly in a case which has been remanded to the state court because of the absence of federal jurisdiction. Therefore, the district court in this instance lacked jurisdiction to sanction plaintiffs' counsel for noticing a deposition in the remanded suit and to issue other orders directly and indirectly interfering in said suit.

The U.S. district courts are courts of limited jurisdiction. Their jurisdiction is defined by statute. "That a court operate solely within its statutory jurisdiction is one of the most fundamental premises of our judicial system." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

The U.S. District Court's lack of jurisdiction over the *Warmsley* suit—and, hence, its lack of jurisdiction to interfere with the plaintiffs' prosecution of their suit in the Superior Court of the State of Connecticut by noticing the deposition of a witness—is governed by 28 U.S.C. § 1447(c), which provides as follows:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. **The State court may thereupon proceed with such case.**

(Emphasis added.)

Section 1447 divests the federal court of jurisdiction upon the entry of its remand order. *In re Katherine Susan Lowe*, 102 F.3d 731, 735 (4th Cir. 1996).

It is axiomatic that remanding a case to state court terminates the jurisdiction of a federal district court over that case. *United States v. Rice*, 327 U.S. 742 (1946).

The entry of the order of remand "divested the district court of all jurisdiction in the case and precluded it from entertaining any further proceedings of any character, including the defendants' motion to vacate the original

remand order." *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 116 (4th Cir. 1979).

The mailing of the certified order of remand is the "determinable jurisdictional event after which the state court can exercise control over the case without fear of further federal interference." *Mints v. Educational Testing Service*, 99 F.3d 1253, 1257 (3rd Cir. 1996).

The federal district court is completely divested of jurisdiction once it mails a certified copy of the order to the clerk of the state court. *Hunt v. Acromed Corporation*, 961 F.2d 1079, 1081 (3rd Cir. 1992). And *see* 1A J. Moore & B. Ringle, *Moore's Federal Practice* para. 0.169[2.-1], at 697 (2d ed. 1983).

"Once a district court has decided to remand a case and has so notified the state court, **the district judge is without power to take any further action**." *Federal Deposit Insurance Corp. v. Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979) (Emphasis added.).

"The federal court has no jurisdiction and can consider no issue in the case following remand." *Federal Procedure*, Removal of Actions § 69:147 (Emphasis added.).

"**Once a case is remanded, and the federal court mails a certified copy of the remand order to the state court, the remand is effected and the state court has jurisdiction to proceed with the case**." *Moore's Federal Practice*, 3d Ed., § 107.43 (Emphasis added.).

"**An order of remand ends the jurisdiction of the federal court**." *Law of the Federal Courts*, 4th Ed., Charles Alan Wright, Remand § 41(Emphasis added.).

Thus it is clear that the jurisdiction asserted by the U.S. District Court over *Warmsley* terminated when the

suit was remanded to the Superior Court of the State of Connecticut.

Upon the occurrence of such "determinable jurisdictional event," the state court re-assumed jurisdiction of the case. *Mints supra.*

Under the authority of 28 U.S.C. § 1447(c), the *Warmsley* plaintiffs were entitled to resume prosecution of their case "without fear of further federal interference." *Id.* They were entitled to proceed to notice the deposition of a witness, Mr. Shannahan. Therefore, their attorney should not have been sanctioned for noticing the Shannahan deposition on their behalf and ordered to terminate their lawsuit.

The orders entered by the Court on July 1, 2003 which are the subject of this motion constitute just such prohibited direct and indirect interference with *Warmsley*.[10] An order of a district court to withdraw the very suit it ordered remanded in the absence of federal jurisdiction is the most blatant form of interference with the state court action—and thus violation of the federal statute—which could be conjured.

II. The appeal should not have been summarily dismissed

The Court of Appeals granted Connecticut Yankee's motion for summary disposition of this appeal. Connecticut Yankee argued in its motion that "summary dis-

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[10] The provisions of the Anti-Injunction Act, 28 U.S.C. § 2283, prohibit the district court from entering injunctive orders that would interfere, directly or indirectly, with the pending state proceedings. *County of Imperial v. Munoz*, 449 U.S. 54, 58-59 (1980) (federal court may not effectively enjoin a state proceeding by framing an injunction as a restraint on parties); *Pathways v. Dunne*, 329 F.3d 108 (2d Cir. 2003).

position is appropriate, *inter alia*, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists," citing *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994).

The petitioner has demonstrated hereinabove that the position of *Connecticut Yankee* in this matter is clearly incorrect. See discussion at 10 *supra*.

In its order granting Connecticut Yankee's motion for summary affirmance, the Court of Appeals asserted that the present appeal is frivolous in light of its July 1, 2003 Summary Order—the subject of petitioner's unsuccessful petition for writ of *certiorari*, *In re Egri* I, 03-865—citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("an appeal is frivolous if it presents an indisputably meritless legal theory or clearly baseless factual contentions").

However, the Court of Appeals order does not identify how the petitioner's "legal theory"—namely, that 28 U.S.C. § 1447(c) prohibits the district court from interfering with a state action following remand for lack of federal jurisdiction—is without merit, nor which if any of the factual contentions asserted by the petitioner it deems "clearly baseless." Indeed, neither the district court's order of contempt nor the Court of Appeals Summary Order makes any reference to 28 U.S.C. § 1447(c), the controlling statute.

The petitioner respectfully disagrees with the Court of Appeals summary conclusion. As she argued in the previous petition for writ of *certiorari*, *In re Egri* I, 03-865, the district court lacked jurisdiction to bind non-parties and attorneys to its voluntary privately-negotiated consent order in *Connecticut Yankee Atomic Power Company v. Town of Haddam*. Thus, as she argued, it had no

authority to sanction the petitioner for instituting *Warmsley*, the wetlands suit or addressing letters to public officials and appearing at public meetings of town agencies. That the Court of Appeals has ruled contrariwise, and the U.S. Supreme Court has denied the petition for writ of *certiorari*, do not render the petitioner's appeal, without more, frivolous. *Sunal v. Large*, 332 U.S. 174, 181, 67 S.Ct. 1588, 91 L.Ed. 1982 (1947) (U.S. Supreme Court denial of certiorari imported no expression of opinion on the merits); *House v. Mayo*, 324 U.S. 42, 48, 65 S.Ct. 517, 89 L.Ed. 739 (1945) (denial of certiorari is not precedential nor authoritative); and *see Spear v. Town of West Hartford*, 789 F.Supp. 80, 84 (D. Conn.) (In the Second Circuit, summary orders "do not constitute formal opinions of the court" and "cannot be cited as precedent.")

Moreover, the Court of Appeals Summary Order of July 1, 2003 did not address the contempt orders which are the subject of this appeal and which were issued by the district court the very same day—July 1, 2003. Nor did the Court of Appeals address in its July 1, 2003 Summary Order the central issue before it in the present appeal, namely, whether the district court acted outside its jurisdiction and contrary to 28 U.S.C. § 1447(c) when it held the petitioner in contempt of court for noticing the Shannahan deposition in the remanded state court action and ordered her to withdraw the state suit.

The Court of Appeals conclusion that the present appeal presents "indisputably meritless legal theory or clearly baseless factual contentions" is clearly mistaken.

CONCLUSION

The district court acted outside its jurisdiction when it sanctioned the petitioner for noticing a deposition in the remanded *Warmsley* suit and when it ordered her to withdraw the *Warmsley* suit from the state court under penalty of contempt.

The district court's egregious error should be corrected and its orders vacated. Therefore, the petitioner requests that this petition be granted.

Respectfully submitted,

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Redding Ridge CT 06876
(203) 938-3952

Petitioner Pro Se

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed December 23, 2003
03-7837

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 23rd day of December two thousand three,

Present:

HON. JOHN M. WALKER, JR.,
Chief Judge,
HON. AMALYA L. KEARSE,
HON. JOSÉ A. CABRANES,
Circuit Judges.

ANDREW EGRI, *et al.*,

Plaintiffs,

NANCY BURTON,

Contemnor-Appellant,

—v.—

CONNECTICUT YANKEE ATOMIC POWER CO., *et al.*,

Defendants-Appellees.

Appellees move for summary affirmance of a district court order finding attorney Nancy Burton in contempt of court for violating a permanent injunction issued by the district court in the above-captioned case. The violation occurred when Ms. Burton scheduled depositions in the *Warmsley* action following the district court's remand of that action to state court in December 2002. Upon due consideration, it is ORDERED that the appellees' motion is granted. In light of this Court's July 1, 2003 summary order upholding a prior order holding Burton in contempt for nearly identical violations of the district court's injunction, the issues presented by this appeal are frivolous. *See In re Andrew Egri*, Docket No. 02-7227(L), 2003 WL 21510422 at *5-*8 (2d Cir. July 1, 2003); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (an appeal is frivolous if it presents an indisputably meritless legal theory or clearly baseless factual contentions).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: OLIVA M. GEORGE
Oliva M. George, Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Filed July 1, 2003
3:02CV400 (AHN)

ANDREW J. EGRI, EDWARD MUNSTER and
NEIGHBORS OPPOSED TO RESIDENTIAL ATOMIC DUMPS

—v.—

CONNECTICUT YANKEE ATOMIC POWER COMPANY, TOWN OF HADDAM BOARD OF SELECTMEN and ALAN PASKEWICH, In His Capacity as Town of Haddam Building Official

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RULING AND SECOND ORDER OF CONTEMPT

This case concerns the on-going efforts of Ms. Nancy Burton, attorney for Plaintiffs in this case and in several related lawsuits, to oppose the construction of a nuclear-fuel storage site in Haddam, Connecticut, by Defendant Connecticut Yankee Atomic Power Company ("Connecticut Yankee"). On March 15, 2002, the court granted a Permanent Injunction proscribing her from, among other things, filing or prosecuting lawsuits that interfere with Connecticut Yankee's construction of the storage site. On July 1, 2002, the court found Ms. Burton in con-

tempt of the Permanent Injunction and awarded Connecticut Yankee $171,546.80 in attorney's fees.

Connecticut Yankee now moves for contempt a second time, claiming that Ms. Burton's continued prosecution of *Warmsley et al. v. Connecticut Yankee Atomic Power Co.*, Conn. Super. Ct. No. CV 02 98136 ("*Warmsley*"), in state court violates the Permanent Injunction. A hearing was held on this motion on June 11, 2003.[1] For the reasons discussed below, the court grants the Motion for Contempt [Doc. # 137] and imposes additional sanctions on Ms. Burton.

BACKGROUND

I. *Procedural History*

On January 29, 2002, the court entered a consent order that fully and finally adjudicated an action brought by Connecticut Yankee on November 21, 2001, entitled *Connecticut Yankee Atomic Power Company v. Town of Haddam, et al.*, Case No. 3:01CV2178(AHN) (the "Related Action").

On March 5, 2002, the court granted Connecticut Yankee a Temporary Restraining Order in the *Egri* litigation, which states in pertinent part:

> Plaintiffs, their successors, assigns, agents and attorneys and all persons with notice of this Temporary Restraining order, are hereby restrained from taking any action that challenges the validity of, or delays, prevents, impairs or interferes with implementation of the Building Permit or Connecticut Yankee's construction, implementation or operation of the ISFSI [i.e., independent spent fuel storage

[1] This hearing was originally scheduled to occur on June 2, 2003, but was rescheduled after Ms. Burton failed to appear.

> installation], other than by direct appeals of this Court's Order or other Filings in this or the Related Action.

Egri et al. v. Connecticut Yankee Atomic Power Company et al., Case No. 3:02CV400 (AHN), Temporary Restraining Order (March 5, 2002) at 3. At this time, the court explicitly warned Ms. Burton that the Temporary Restraining Order precluded her from filing additional lawsuits to challenge Connecticut Yankee's construction of the ISFSI:

> THE COURT: Ms. Burton . . . you should be on notice and aware that by the signing of this temporary restraining order, you are going to be restrained by virtue of my signature on this order, from filing any further lawsuits; that is to say, this lawsuit that you just made reference to that you intended to take up to Middletown to file . . . you can't file it once I sign this order.

Egri et al. v. Connecticut Yankee Atomic Power Company et al., Case No. 3:02CV400 (AHN), Transcript of Conference on Application for Temporary Restraining Order (March 5, 2002) ("March 5 Tr.") at 25. The court reiterated this warning when answering a question from Attorney Burton:

> THE COURT: [Y]ou are restrained from doing anything now, that challenges or delays or interferes with this building permit. So that if this action which you propose to file in Middletown tomorrow comes within the ambit of that language, yes, you are restrained from doing so. You can't file the action.

Id. at 32-33.

On March 15, 2002, after hearing extensive testimony and argument, the court granted Connecticut Yankee's Application for Temporary and Permanent Injunction (the "Permanent Injunction") pursuant to 28 U.S.C. § 1651, the All Writs Act. In so ruling, the court concluded that a "Permanent Injunction was necessary and appropriate in aid of this Court's jurisdiction in the [the Related Action]," and found that:

> D. Connecticut Yankee would suffer irreparable harm if the requested permanent injunction did not issue because it would suffer further delays in its ongoing decommissioning process;
>
> E. Other actions challenging the validity of the Order (or any actions taking in accordance with the Order) in any other judicial or administrative forum would violate the order, frustrate its implementation, or undermine this Court's jurisdiction in the Related Action;
>
> * * *
>
> H. A permanent injunction is necessary to ensure the integrity and finality of the Order, and to prevent frustration of its implementation. . . .

Eari et al. v. Connecticut Yankee Atomic Power Company et al., Case No. 3:02CV400 (AHN), order Granting Permanent Injunction (March 15, 2002) at 2. Using language identical to that appearing in the Temporary Restraining Order, the Permanent Injunction continued to prohibit Ms. Burton from filing new lawsuits or administrative challenges:

> Plaintiffs, their successors, assigns, agents and attorneys, and all persons with notice of the permanent injunction, are hereby permanently enjoined

> from seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the Order, including the Building Permit issued thereunder, other than by a direct appeal of this Court's Order or other filings in this action or in the Related Action.

Id. at 3. The *Egri* litigation is presently on appeal before the Second Circuit Court of Appeals.

On July 8, 2002, the court concluded that Ms. Burton had violated the Permanent Injunction by, among otherr things, instituting and prosecuting *Warmsley et al. v. Connecticut Yankee Atomic Power Co.* (Order of Contempt dated July 8, 2002.) In so ruling, the court made the following finding:

> Attorney Burton represents Plaintiffs in *Warmsley, et al. v. Connecticut Yankee Atomic Power Company*, 3:02cv768 (AHN), which seeks "[a] temporary and permanent injunction to enjoin construction activities associated with the [Independent Spent Fuel Storage Installation] on lands once owned by Venture Smith."

Id. Based on this finding, among others, the court determined that Ms. Burton's actions violated Paragraph 3 of the Permanent Injunction, which forbids her "from seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the order, including the Building Permit issued thereunder, other than by a direct appeal of this Court's Order." Accordingly, the court found Ms. Burton in contempt for violating the Permanent injunction and awarded $171,546.80 in attorney's fees to Connecticut Yankee. (Order dated July 24, 2002.)

II. *Findinas of Fact Relevant to the Instant Motion for Contempt*

In prosecuting *Warmsley* in state court,[2] Ms. Burton issued notices of deposition dated December 13, 2002, and December 17, 2002, to representatives of Connecticut Yankee and the Connecticut Historical Commission. She also issued a Subpoena Duces Tecum to Russell Mellor, a former officer of Connecticut Yankee, on December 17, 2002. Connecticut Yankee and the State of Connecticut moved to quash the depositions and alerted the state court to the Permanent Injunction.

The Superior Court for the State of Connecticut (Jones, J.) (the "state court") held a hearing on December 20, 2002, to consider the various issues presented by Ms. Burton's continued prosecution of *Warmsley*. During this hearing, Connecticut Yankee explained to the state court that the Permanent Injunction remained in effect. Consequently, the state court refused to permit any further proceedings in *Warmsley* until the District Court ruled on whether Mr. Burton's continued prosecution of *Warmsley* constituted a violation of the Permanent Injunction. (Transcript of *Warmsley* state court proceeding, December 20, 2002, at 34.)

Ms. Burton then sent this court a letter dated May 8, 2003, requesting that the court "confirm" that it had no jurisdiction over *Warmsley* and the continued prosecution thereof in state court. On May 9, 2003, without waiting for the court's response, Ms. Burton issued an Amended Notice of Deposition and a Subpoena Duces Tecum directed to John Shannahan, Historic Preservation Officer for Connecticut. Connecticut Yankee filed a Motion to Quash in state court.

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[2] The *Warmsley* case was originally brought in federal court, but later remanded to state court on December 10, 2002.

STANDARD

A court's inherent power to hold a party in civil contempt may be exercised when: (1) the order that the party allegedly failed to comply with is clear and unambiguous; (2) the proof of the noncompliance is clear and convincing; and (3) the party has not diligently attempted in a reasonable manner to comply. *See EEOC v. Local 638, Local 28 of Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1178 (2d Cir. 1985), *aff'd*, 478 U.S. 421 (1986). The Second Circuit has defined a "clear and unambiguous order" as one that leaves "no uncertainty in the minds of those to whom it is addressed, who must be able to ascertain from the four corners of the order precisely what acts are forbidden." *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995) (internal quotation marks omitted). It is not necessary to find willfulness to adjudge a party in contempt. *Canterbury Belts, Ltd. v. Lane Walker Rudkin, Ltd.*, 869 F.2d 34, 39 (2d Cir. 1989).

DISCUSSION

I. *Civil Contempt*

The court finds that the elements of civil contempt are easily satisfied in this case. First, there is no question that the underlying order at issue here is clear and ambiguous. The plain language of the Permanent Injunction enjoins Ms. Burton, among others, from "seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the [construction of the storage site]." *Egri et al v. Connecticut Yankee Atomic Power Company et al.*, No.

3:02CV400 (AHN), Order Granting Permanent Injunction (March 15, 2002) at 3.

Second, the court finds that the evidence of Ms. Burton's noncompliance is clear and convincing, and that she has not made diligent efforts in a reasonable manner to comply with the Permanent Injunction. Ms. Burton, as the Plaintiff's attorney of record, is knowledgeable about the Permanent Injunction, and she has been previously found in contempt for instituting and prosecuting the *Warmsley* suit. (See Order of July 8, 2002.) Her efforts to advance discovery by issuing deposition notices or subpoenas—with the ultimate goal of securing a favorable judgment for her clients—contravene the Permanent Injunction's clear proscription against "seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the order." *Id.* As a seasoned attorney adverse to Connecticut Yankee in several related suits, Ms. Burton cannot plausibly maintain that she did not understand that the proscription against "seeking a judgment or administrative ruling" included the prosecution of suits such as the *Warmsley* litigation. Furthermore, her decision to pursue this discovery without awaiting the court's response to her letter of May 8, 2003, underscores her willfulness in engaging in this proscribed course of conduct.

II. *Sanctions for Ms. Burton's Contempt*

In light of Ms. Burton's continued disregard for the Permanent Injunction and the court's previous finding of contempt, the court has "broad discretion to fashion an appropriate coercive remedy" based on the nature of the harm and the probable effect of alternative sanctions. *See N.A. Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 857 (2d Cir. 1984); *see also EEOC v. Local 28 of Sheet Metal Workers Intern. Ass'n*, 247 F.3d 333, 336 (2d Cir.

2001). A civil contempt sanction may serve either to coerce the contemnor into future compliance with the court's order or to compensate the complainant for losses resulting from the contemnor's past noncompliance. *See United States v. United Mine Workers of Amer.*, 330 U.S. 258, 303-04 (1947). A sanction may be both coercive and compensatory. *Id.*

When imposing a coercive sanction, a court should consider: "(1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor's financial resources and the consequent seriousness of the sanction's burden." *Dole Fresh Fruit Co. v. United Banana co.*, 821 F.2d 106, 110 (2d Cir. 1987). Similarly, while compensatory sanctions are appropriate to compensate a complainant for harm suffered due to contumacy, proof of pecuniary loss is not required to support a civil contempt fine. *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455-56 (1932).

In addition, it is appropriate for the court to award the reasonable costs of prosecuting the contempt, including attorney's fees, if the violation of the decree is found to have been willful. *See, e.g., Manhattan Indus., Inc. v. Sweater Bee by Banff Ltd.*, 885 F.2d 1, 8 (2d Cir. 1989). Contempt is willful where the contemnor has actual notice of the court's order, was able to comply with it, did not seek to have it modified, and made no effort to comply. *See King v. Allied Vision Ltd.*, 919 F. Supp. 747, 753 (S.D.N.Y. 1996).

CONCLUSION

Based on the hearing held on June 11, 2003, and the materials submitted by the parties, the court finds that Ms. Burton has again willfully violated the Permanent Injunction by prosecuting the *Warmsley* litigation. Accordingly, the court grants Connecticut Yankee's Motion for Contempt [Doc. # 137] and orders the imposition of the following sanctions to coerce Ms. Burton's compliance with the Permanent Injunction as well as to compensate Connecticut Yankee for its expense in bringing this motion:

1. Ms. Burton shall withdraw within three days of this Order's issuance all notices of deposition and any other documents served by her for the purpose of prosecuting *Warmsley, et al. v. Connecticut Yankee Atomic Power Company*, Conn. Super. Ct. No. CV 02 98136.

2. Three days after this Order has been issued, Ms. Burton shall be subject to an escalating sanction of $1,000.00 for each 24-hour period in which she has not withdrawn any document served by her for the purpose of prosecuting *Warmsley, et al. v. Connecticut Yankee Atomic Power Company*, Conn. Super. Ct. No. CV 02 98136. The same escalating sanction also shall apply if Ms. Burton serves or files any new document that continues her prosecution of the *Warmsley* litigation.

3. Ms. Burton shall pay $2,500.00 to compensate Connecticut Yankee for reasonable attorney's fees incurred in bringing this Motion for Contempt.

SO ORDERED this 30th day of June, 2003, Bridgeport, Connecticut.

ALAN H. NEVAS
Alan H. Nevas
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-7837
Filed February 17, 2004

ORDER

Before: Hon. John M. Walker, Jr., Chief Judge, Hon. Amalya L. Kearse, Hon. Jose A. Cabranes, Circuit Judges

IT IS HEREBY ORDERED that the motion be and it hereby is Denied.

FOR THE COURT

Roseann B. MacKechnie, Clerk
By

Laura Bass Penn, Motions Staff Attorney

2-17-04
Date

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIV. NO. 3:02CV768 (AHN)
DECEMBER 20, 2002

DAVID WARMSLEY *et al.*

—v.—

CONNECTICUT YANKEE ATOMIC POWER COMPANY

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

The plaintiffs move to amend their motion for remand to move that the district court order the defendant, Connecticut Yankee Atomic Power Company ("CYAPCo") and its attorneys, John B. Nolan, personally, Alan B. Taylor, personally, Alex Filippo, personally, and their law firm, Day, Berry & Howard LLP (collectively, DBH"), to pay the plaintiffs attorney's fees and costs for wrongful removal of this action from the Connecticut Superior Court to the U.S. District Court.

The wrongful removal by CYAPCo and DBH occurred without cause in their assertion of a non-existing federal question and such act was malicious and vexatious and motivated by a bad-faith campaign to destroy and impair

a cultural and archaeological resource of great importance to the nation in pursuit of an illegal scheme to site a high-level radioactive waste dump upon the Broteer-Venture Smith Archaeological Site.

Costs and attorneys fees are warranted for the following reasons:

1. The complaint filed in the Superior Court of the State of Connecticut on April 17, 2002 alleges violation of the Connecticut Environmental Protection Act, Connecticut General Statutes §22a-19a.

2. The complaint does not allege a federal question.

3. There is no diversity of citizenship among the parties.

4. CYAPCo and DBH removed the case to the U.S. District Court on May 5, 2002 asserting federal question jurisdiction under the All Writs Act, 28 U.S.C. §1651.

5. The All Writs Act does not provide an independent basis for federal jurisdiction to warrant lawful removal of a case brought in the state court alleging a state law issue.

6. When CYAPCo and DBH removed this case to the federal court, they did so without legal cause and with malice in order to frustrate the rights of the plaintiffs in this public interest action to protect and preserve the Broteer-Venture Smith Archaeological Site from acts of unreasonable destruction and impairment pursuant to the laws of the State of Connecticut.

7. On December 10, 2002, seven months later, the U.S. District Court ordered the case remanded to the Connecticut Superior Court in recognition of the complete absence of federal subject matter jurisdiction.

8. The malicious and wrongful motives of CYAPCo and DBH have been manifested throughout the course of the proceedings in this case in the U.S. District Court by such acts as the following:

a. Filing a knowingly false denial in their answer to the complaint (paragraphs 20, 21, 27, 28) that Broteer-Venture Smith (c.1729-1805) owned the site in question and that CYAPCo's conduct will destroy and impair the site;

b. Vexatiously resisting the plaintiffs' rights in discovery to inspect the site to prepare an A-2 survey of the Broteer-Venture Smith Archaeological Site, a critical component of the plaintiffs' proof;

c. Wilful destruction of sensitive portions of the Broteer-Venture Smith Archaeological Site notwithstanding recovery of pottery shards and other tangible evidence of Venture Smith's use and occupation of the site in question;

d. Vexatious filing of a motion for contempt against plaintiffs' counsel for *inter alia* instituting the instant action;

e. Continuing to falsely assert jurisdiction of the federal court in this matter to the U.S. Court of Appeals.

9. The plaintiffs seek attorney's fees in the amount of $171,546.

10. The plaintiffs seek costs as a sanction in an amount to cover the costs of restoration of the Broteer-Venture Smith Archaeological Site and its preservation and maintenance in perpetuity, which sum is estimated to exceed $300 million.

11. The plaintiffs intend that such fees and costs as may be imposed upon CYAPCo and DBH be dedicated in whole to a foundation to be established to restore the Broteer-Venture Smith Archaeological Site and provide for its preservation and maintenance in perpetuity as well as to provide a means of educating the public about the life of Broteer-Venture Smith.

A memorandum of law accompanies this motion.

THE PLAINTIFFS

By: _____

Nancy Burton, Esq.
147 Cross Highway
Redding Ridge CT 06876
Tel. 203-938-3952
Fed. Bar No. 10836

CERTIFICATION

This is to certify that a copy of the foregoing was mailed on December 20, 2002 via U.S. Mail, postage pre-paid to the following:

John B. Nolan, Esq.
Day, Berry & Howard LLP
CityPlaceI
Hartford CT 06103-3499

_____